



Collins, J. (2017). Exploitation of persons and the limits of the criminal law. *Criminal Law Review*, [2017](3), 167-184.

Peer reviewed version

[Link to publication record in Explore Bristol Research](#)
PDF-document

This is the author accepted manuscript (AAM). The final published version (version of record) is available online via Sweet & Maxwell. Please refer to any applicable terms of use of the publisher.

University of Bristol - Explore Bristol Research

General rights

This document is made available in accordance with publisher policies. Please cite only the published version using the reference above. Full terms of use are available:
<http://www.bristol.ac.uk/red/research-policy/pure/user-guides/ebr-terms/>

Exploitation of Persons and the Limits of the Criminal Law

Jennifer Collins*

University of Bristol

Summary

The concern in this article is to challenge the rhetorical push toward criminalization, which has tended to dominate discussion of the state's response to exploitation of persons. This article argues that there are overlooked limitations in using the criminal law to respond to exploitation of persons. It first highlights imprecision regarding the relationship between exploitation of persons and principles for criminalization. It is argued that the logically prior question of the role of the state must be addressed, and that one strong normative basis for state action arises from republican political theory. Secondly, it exposes a set of five current challenges concerning the use of the criminal law in England and Wales to penalize exploitation, putting forward suggestions as to how they can be addressed with principled arguments. The argument in this part is that it is only by exposing and confronting these difficulties that clarity in the criminal law can be strengthened.

Introduction

Exploitation of persons is a topic currently attracting the attention of lawyers across several branches of the common law, which include contract law, tort

law, immigration rules, labour law and the criminal law.¹ As ever, there is a temptation for law reformers to turn to heavy-handed criminal law measures in their response. Theresa May's concern as Home Secretary to ensure that "the worst perpetrators [of modern slavery] receive the lengthy custodial sentences...they deserve", was the driver to attaching maximum life sentences to the offences created in ss. 1-2 of the Modern Slavery Act 2015.² Any such measures, even if they can be clearly justified, carry risks. Of interest to criminal lawyers is Cathryn Costello's recent analysis of the legal response to exploitation of persons in the labour market.³ Costello argues that if too much weight is placed on using criminal law measures in this context, attention is diverted away from "the laws, practices and regulatory gaps that set up the vulnerability to forced labour".⁴ "The criminal law focuses on the outcome (the forced labour itself)", whereas a labour law response may be better placed to address the source of vulnerability of vulnerable migrant workers.⁵

While it can be doubted whether the current criminal law response only penalizes the outcome of exploitation in the context of forced labour (see part 3 below), Costello's argument is an important corrective to an over-focus on criminalization in addressing exploitation of persons. Criminalisation is, and

* I am sincerely grateful to Andrew Ashworth and David Ormerod for comments on previous drafts, and to Stuart Green and Rebecca Williams for discussion of this material. Parts of this article draw on my doctoral research, funded by the AHRC. The usual disclaimers apply.

¹ For example, *Hounga v Allen* [2014] UKSC 47; [2014] 1 WLR 2889; *Taiwo v Olaigbe and another; Onu v Akwiwu and another* [2016] UKSC 31; [2016] 1 WLR 2653.

² Hansard, HC col.172 (8 July 2014), increasing maximum sentences beyond those laid down in Sexual Offences Act 2003 s.59A; Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 s.4; and Coroners and Justice Act 2009 s.71.

³ C. Costello, "Migrants and Forced Labour: A Labour Law Response" in A. Bogg, C. Costello, A.C.L. Davies and J. Prassl (eds), *The Autonomy of Labour Law* (Oxford: Hart, 2015), p.189.

⁴ above, p.191.

⁵ above, p.191.

should continue to be seen as, limited in addressing the root of power dynamics which may lead to exploitation. But in this article I argue that there are other neglected difficulties in using the criminal law against exploitation. First, the relationship between exploitation of persons and principles for criminalization is characterized by deep complexity and uncertainty, as highlighted in part 1. This leads on to the argument in part 2 that the logically prior question of the role of the state must be addressed, and that one strong normative basis for state action arises from republican political theory.

Second, taking analysis of the current criminal law response to exploitation in England and Wales as its starting point in part 3, part 4 argues that there are five current challenges in using the criminal law to penalize exploitation which require attention. There are dangers that clarity in the criminal law can be undermined in the following ways: by the tendency to assume that existing criminal offences cover exploitative conduct, either intrinsically or through judicial interpretation, without supporting argument (illustrated in the property offences sphere); by failure to clearly explain what is wrongful about a specific type of interpersonal exploitation; by uncertainty about the type of account of exploitation which criminal lawyers are providing—be it a cluster of central cases, analytical or normative; by lack of coherence between the criminal law and other branches of the common law in responding to exploitation; by exploitation's complex relationship with valid legal consent. Whilst not underplaying their deep complexity, some suggestions are put forward for navigating these challenges in a principled way.

The article's focus is upon the criminal law response to exploitation in interpersonal scenarios such as financial exploitation, sexual exploitation, labour exploitation, and trafficking of persons for exploitation, rather than on how the criminal law responds to exploitation in the marketplace (for example, through the criminalization of cartels).

Exploitation of persons and criminalization principles

At the centre of western free market economies lies the idea that individuals are free to engage in commercial practice.⁶ Individuals have freedom to make gain for themselves or another, or to cause loss or the risk of loss to others. It is quite plausible that one individual (A) will use another person (B) in furthering his own aims. For example, A may use another person's characteristics—his gullibility, good nature, generosity or intelligence. Or A may use his more powerful or dominant position over B. If the claim that "A exploits B when A takes unfair advantage of B" describes what it means to exploit another person at the most general level, then we can say in cases where one individual takes advantage of a more naïve person, for example, that he is exploiting that person.⁷ But this "exploitation" is not necessarily problematic, nor anything that ought to be redressed by the law.

This is not an unrestricted opportunity. At some point restrictions must be placed on an individual's freedom to exploit another person. This is to ensure

⁶ See *Valujevs* [2014] EWCA Crim 2888; [2015] W.L.R. 109 at [43]-[44].

⁷ A. Wertheimer, *Exploitation* (Princeton: Princeton University Press, 1999), p.16.

that both A and B have freedom to flourish.⁸ The point at which state interference is justified, and what form it should take, are contestable, illustrated in Kant's statement that persons must "treat humanity, whether in your own person or in that of another, always as an end and never as a means only".⁹ The Kantian argument does not prohibit all exploitative use of persons. It merely tells against using persons as mere means. In justifying a legal response to exploitation, how can we distinguish between using another person (which is permissible), and using someone as a mere means (which is not)?

The state has certain international obligations to protect individuals from serious exploitation, explored in part 2 below. For example, while an employer may take advantage of an employee in the labour force, he cannot subject him to conditions of slavery, servitude or forced labour. A justifiable state response to such conduct may be to create regulatory or labour law measures, for example. Exploitative conduct may also justifiably attract criminal law sanction, with strong justification for a criminal law offence required, taking into account the type of offence proposed and the level of criminalization. Threshold conditions to criminalization, familiar to liberal criminal law theorists, must first be satisfied—the need for a serious public wrong, and for conduct which causes harm or poses the risk of harm, for example.¹⁰ Further principles for criminalization cannot be explored in this

⁸ A. Ashworth, "Self-defence and the Right to Life" (1975) 34 C.L.J. 307: "Freedom from interference can only be preserved by restricting everyone's freedom to exercise power over others."

⁹ I. Kant, *Foundations of the Metaphysics of Morals*, Lewis Beck (translator) 2nd edn, (Indianapolis: Bobbs-Merrill, 1959) p.47.

¹⁰ See A.P. Simester and A. von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Oxford: Hart, 2011).

short piece. However, we ought to flag initial concerns that exploitation of persons will have a more complex relationship with thresholds to criminalization than other forms of wrongdoing. We see this reasoning surface in Stuart Green's comparison of exploitation and coercion in his study of the theoretical foundations of white-collar crimes.¹¹ Green's first argument is that exploitation does not produce harm in the same way as coercion: "the harms typically associated with coercive behavior are greater than the harms typically associated with exploitation."¹² His second is that wrongful coercion is "inherently a more serious wrong than exploitation".¹³ Thirdly, Green argues that exploitation may be "harder to distinguish from merely aggressive but lawful business behavior than is coercion".¹⁴ This is not to say that exploitation of persons will never satisfy thresholds to criminalization. Some forms of exploitative conduct will cause harm more serious than coercive conduct, for example. The strength of a particular argument for criminalization can only be made robust with appropriate regard to the nature of the exploitative wrong and the proposed level of criminalization. In other words, a criminalization argument must be made specific rather than general. Nevertheless, a preliminary issue first requires attention. Without being clear about the state's obligations to redress exploitation of persons, any specific argument for criminalization is undercut from the outset.

The role of the state in penalizing exploitation of persons

¹¹ S.P. Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (Oxford: OUP, 2006).

¹² above, p.97.

¹³ above, p.97.

¹⁴ above, p.97.

i. International obligations

A large number of international documents set out the right of individuals to be protected from various forms of interpersonal exploitation, and so provide one broad basis for state action. Protection against the most serious forms of labour exploitation (slavery, servitude and forced labour) is widely recognized in international human rights documents¹⁵, as is the requirement that the state addresses sexual exploitation.¹⁶ Trafficking of persons is not necessarily the same as exploitation of persons, but movement of persons provides opportunity for exploitation, and is often undertaken for this purpose. It is sufficiently part of the wider “problem” of interpersonal exploitation to justify considering it here. While a number of international obligations upon the state to address trafficking of persons exist¹⁷, it is interesting to note that one bold development in European Human Rights law has been the European Court of Human Rights’ willingness in *Rantsev* to read into art.4 ECHR a right not to be subjected to human trafficking.¹⁸ The court relied upon abstract ideas of human dignity and fundamental freedoms as the drivers for this interpretation.¹⁹ The use of ECHR rights to protect against exploitation of

¹⁵ Art.4 of the Universal Declaration of Human Rights; art.4 of the European Convention on Human Rights (ECHR), as explicated in *Siliadin* (2006) 43 EHRR 16 at [116], [122]-[123]. The International Labour Organization’s (ILO) *Declaration of Fundamental Principles and Rights at Work*, requires all ILO members “to promote and realize...the elimination of all forms of forced or compulsory labour”, as well as the abolition of child labour, adopted on 18 June 1998 (revised 15 June 2010).

¹⁶ The European Parliament approved the Committee on Women’s Rights and Gender Equality’s *Report on sexual exploitation and prostitution and its impact on gender equality* (2013/2130(INI)) in March 2014. The report calls on member states of the EU “to discourage the demand for exploitation through prostitution and human trafficking for sexual exploitation”.

¹⁷ Arts.2-3, of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime* (New York: UN, 2000). Member states of the Council of Europe are required under art.1 of the Convention on Action against Trafficking in Human Beings (CETS 197, 2005), to “prevent and combat trafficking in human beings, while guaranteeing gender equality”. While the United Kingdom remains a member of the European Union, Directive 2011/36/EU on trafficking in human beings remains in force in England and Wales (adopted by the UK on 18 October 2011).

¹⁸ *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1 at [282].

¹⁹ above, at [282].

persons is far from settled. Art.5 ECHR provides that “everyone has the right to liberty and security of person”. The rampant spread of sexual exploitation in towns and cities is plainly a threat to the security of persons, so there is scope here for counsel to plead this argument before the Strasbourg court.

There is additional and specific protection for children from exploitation. The UN Convention on the Rights of the child requires state parties to protect children from economic and labour exploitation (art.32); sexual exploitation and abuse (art.34); and abduction, sale and trafficking (art.35). Art.1 of the Council of Europe’s *Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse* requires member states to prevent sexual exploitation, protect the rights to victims, and to promote national and international cooperation against sexual exploitation of children.

Criminal law measures may need to be implemented in order to secure these rights where existing measures are held to be insufficient.²⁰ The Strasbourg court in *Siliadin* imposed positive duties upon states “to adopt criminal law provisions which penalize the practices referred to in Article 4 [ECHR] and to apply them in practice” in order to keep pace with international developments.²¹ States are also required to have in place (i) “thorough and effective” investigations of breaches of ECHR rights;²² and (ii) “preventive operational measures” to prevent risks to an individual’s ECHR rights “from

²⁰ In *CN v UK* [2012] ECHR 4239/08 (13 November 2012) at [81], the ECtHR found that art.4 ECHR was violated because “investigation into the applicant’s complaints of domestic servitude was ineffective due to the absence of specific legislation criminalising such treatment”.

²¹ *Siliadin* (2006) 43 EHRR 16 at [89].

²² *Aydin v Turkey* (1998) 25 EHRR 251 at [103].

the criminal acts of a third party”.²³ International human rights obligations and EU legislation which must be implemented in national systems, are other bases for positive duties upon the state to enact criminal law measures and/or effective investigatory machinery and procedures with regard to interpersonal exploitation. Art.5 of the “Palermo Protocol” requires signatory states to enact, where necessary, criminal law measures to combat the intentional trafficking in persons, as defined in art.3 of the Protocol. Art.4 requires the “prevention, investigation and prosecution of the offences established” in art.5 of the Protocol. Moreover, the new Protocol of 2014 to the Forced Labour Convention, 1930—a supplement to the ILO Convention 29, which came into force on 9 November 2016—requires effective criminal law measures “to sanction the perpetrators of forced or compulsory labour”.²⁴ So too art.18 of the Council of Europe’s Convention on Action against Trafficking in Human Beings CETS 197 2005 requires signatory states to “adopt such legislative and other measures as may be necessary to establish as criminal offences” trafficking in human beings.²⁵

ii. An argument from political theory

So far we have discussed what the state must do in order to comply with its international obligations. The argument advanced here is that at a deeper level a normative basis for state action to redress exploitation must be addressed. Questions about criminalizing exploitation are not removed from

²³ *Van Colle v United Kingdom* (2013) 56 EHRR 839 at [88].

²⁴ Art.1.

²⁵ As defined in art.4.

questions about state power, and how that power should be exercised.²⁶ Republican political theory points most clearly in the direction of a foundational duty upon the state to address serious exploitation of persons. Republicanism takes as its animating idea “freedom as non-domination”—a term coined by Philip Pettit.²⁷ On this view liberty is the absence of domination or independence from arbitrary power. A person is not free if they have “to live at the mercy of another” or if they have to “live in a manner that leaves [them] vulnerable to some ill that the other is in a position arbitrarily to impose”.²⁸ While there are a number of streams of republican thought, the clear concern in all is with structural conditions being present for arbitrary or uncontrolled domination, even if that capacity is not exercised.²⁹

Either the state or fellow citizens may hold such a capacity to interfere arbitrarily in a citizen’s life. The state holds capacity to interfere in its citizens’ lives because it has the power to make and enact law, though this is not necessarily a capacity to interfere arbitrarily.³⁰ It is the potential for arbitrary interference of one citizen by another which is of interest to us here. In Pettit’s account, a citizen should not hold the capacity to arbitrarily dominate his fellow citizens: this is a humiliating “form of unfreedom”, which makes one

²⁶ Thus fulfilling the need for a “deeper embedding of criminalisation theory in general political theory”, see A.P. Simester and A. von Hirsch, “On the Legitimate Objectives of Criminalisation” (2016) (10) *Crim. L. and Philosophy* pp.367, 370.

²⁷ P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: OUP 1999).

²⁸ above, p.5-6.

²⁹ See S. Besson and J. Martí (eds.), *Legal Republicanism: National and International Perspectives* (Oxford: OUP, 2009).

³⁰ J. Bentham, “Anarchical Fallacies” in J. Bowring (ed), *The Works of Jeremy Bentham*, vol 2 (Edinburgh: Tait, 1843), p.503: “All coercive laws...and in particular all laws creative of liberty, are, as far as they go, abrogative of liberty.”

citizen's status dependent upon another's continued goodwill.³¹ As Alan Bogg and Cynthia Estlund note:

“where there is a shared awareness of this vulnerability, it is a shaming and demeaning status to occupy. The dominated citizen might resort to strategies of deference or subterfuge in order to placate the powerful.”³²

It is important, Pettit argues, that a citizen need not “live on their wits, whether out of fear or deference”.³³ There is a strong link here with interpersonal exploitation. Where one individual holds the capacity for uncontrolled or arbitrary domination over another, there is real opportunity for exploitation of persons.³⁴ Recent research on grooming has explored how exploiters seek to set themselves in positions of domination over vulnerable persons.³⁵ In other cases, exploiters take advantage of ready-made opportunities for control. While capacity for uncontrolled domination is one step removed from exploitation, it creates opportunity for exploitation. When will a citizen hold capacity for arbitrary or uncontrolled domination in cases of exploitation? Concerns about this structural condition ought surely to only come into play in highly problematic circumstances, where exploiters act deliberately to target another person and with knowledge of another's vulnerability. The task is to

³¹ See P. Pettit, “Criminalization in Republican Theory” in R.A. Duff and others, *Criminalization: The Political Morality of the Criminal Law* (Oxford: OUP, 2014), p.138.

³² A. Bogg and C. Estlund, “Freedom of Association and the Right to Contest” in *Voices at Work: Continuity and Change in the Common Law World* (Oxford: OUP, 2014), p.152.

³³ See P. Pettit, “Criminalization in Republican Theory” in R.A. Duff and others (eds), *Criminalization: The Political Morality of the Criminal Law* (Oxford: OUP, 2014), p.138.

³⁴ “Uncontrolled” domination is Pettit's more recent term.

³⁵ For discussion of “localized grooming” and the relevance of “targeting”, see Home Affairs Select Committee, *Child Sexual Exploitation and the Response to Localised Grooming* (5 June 2013) para 8.

identify situations where individuals are particularly or highly vulnerable to being exploited (such as where persons have been trafficked for the purpose of exploitation, or where young persons have been taken into care and are therefore deemed “at risk” of exploitation).³⁶

To support republican ideals is not to contend that citizens must be legally protected against capacity for arbitrary domination from other persons. There is a strong presumption within republicanism that non-domination is supported through civic virtue and deliberative democracy. Pettit argues that because republicanism requires that rights “will be richer than any that the law alone could support”, they therefore “depend on the sort of informal implementation that is possible only in a vibrant society”.³⁷ State interference may be justified only in situations where it is important that a citizen’s safeguarding is “a matter of common awareness”.³⁸ If a state must intervene to secure non-domination in certain circumstances, this will not in the first instance be via criminal law measures, but via regulatory or civil law measures. Coercive power must be exercised within a system of effective procedures and enforcement, with an emphasis on the rule of law as an ideal.³⁹ Accordingly, the limitations of the normative argument must be made clear in relation to exploitation of persons. While a brief survey of republicanism seems in principle to support a foundational duty upon the state to deal with serious exploitation of persons,

³⁶ See Barnardo’s, “Puppet on a String: The Urgent Need to Cut Children Free From Sexual Exploitation” (2011).

³⁷ Pettit, *Republicanism: A Theory of Freedom and Government* (1999), p.305.

³⁸ P. Pettit, “Criminalization in Republican Theory” in *Criminalization: The Political Morality of the Criminal Law* (Oxford: OUP, 2014), pp.138-39. “Your safeguarded status must be manifest and salient to all...Only then can you walk tall among your fellows, conscious of sharing in the general recognition that no one can push you around with an expectation of impunity”.

³⁹ For discussion, see R. Dagger, “Republicanism and the Foundations of Criminal Law” in R.A. Duff and S. Green (eds), *Philosophical Foundations of Criminal Law* (Oxford: OUP, 2011) p.48 ff.

this does not justify the use of the criminal law. That would require analysis of arguments for and against criminalization, with arguments in favour outweighing arguments against. While we have focused here on the role of the state to address exploitation in the republican tradition, it is arguable that a similar grounding could come from within the liberal tradition.⁴⁰ It is beyond the scope of this article to consider how the state's role in penalizing exploitation of persons might fit in to a liberal framework.

The current response of English criminal law

Building on this normative foundation, let us now put this discussion in the context of the criminal law of England and Wales. What is the current criminal law response to exploitation of persons in England and Wales? This is an area of the criminal law in flux. Against strong rhetorical pressure to criminalise various forms of exploitation, it is easy to lose track of how many “exploitation offences” there currently are.⁴¹ The key examples can be divided into two broad categories. Clearly the meaning of “exploitation of persons” requires further interrogation, with discussion of this point to follow in part 4 below.

i. The first category is general offences which cover exploitative conduct, either intrinsically or through judicial interpretation. These offences need not have been explicitly designed to penalize interpersonal exploitation, but may

⁴⁰ For example, under the auspices of a “right to security”, see L. Lazarus, “The Right to Security” in R. Cruft, M. Liao and M. Renzo (eds), *The Philosophical Foundations of Human Rights* (OUP 2014) p.424; S. Fredman, “The Positive Right to Security” in B. Goold and L. Lazarus, *Security and Human Rights* (Hart 2007) p.307.

⁴¹ T. May, “Slaves May Work in Your Nail Bar Too” *The Telegraph* (London, 24 November 2013).

penalize *certain aspects* of exploitative conduct and/or the result(s) of exploitation. In *CN v UK*, the European Court of Human Rights noted that in the absence of a specific exploitation offence to penalize slavery, servitude or forced and compulsory labour, several existing criminal offences could be used.⁴² These included “offences of trafficking, false imprisonment, kidnapping, grievous bodily harm, assault, battery, blackmail and harassment”.⁴³ Other broad offences could be added to this list: for example, many criminal law commentators seem comfortable with theorizing fraud by abuse of position as a means of penalizing financial exploitation of the naïve and gullible, post-*Hinks*.⁴⁴

ii. A second approach has been to enact specific exploitation offences, drafted in a variety of forms. There is scope for debate as to what is meant by exploitation offences. For the purposes of this brief overview we mean offences enacted with the purpose of preventing or penalizing exploitative conduct and/or the result(s) of exploitative conduct. The statute itself, or its Explanatory Notes, will be the clearest means of establishing an offence’s purpose. Ss.1-2 of the Modern Slavery Act 2015 can be identified as “core” exploitation offences, given references to exploitation in the 2015 Act itself.⁴⁵ Sentencing guidelines, Parliamentary debates and judicial statements may also need to be referred to in determining whether an offence fits in to this

⁴² *CN v UK* (2013) 56 EHRR 24.

⁴³ *CN v UK* (2013) 56 EHRR 24 at [74].

⁴⁴ [2000] UKHL 53; [2001] 2 A.C. 241. See D. Ormerod and K. Laird, *Smith and Hogan’s Criminal Law* (Oxford: OUP, 2015), pp.896-97; A.P. Simester, J.R. Spencer, F. Stark, G.R. Sullivan and G.J. Virgo, *Simester and Sullivan’s Criminal Law: Theory and Doctrine* 6th edn. (Oxford: Hart, 2016), p.639.

⁴⁵ s.32 of the Human Tissue Act 2004—which criminalizes commercial dealings in human material for transplantation—is another example of a core exploitation offence. This is because s.32 is identified as a form of exploitation under s.3 of the Modern Slavery Act 2015. The offence carries a maximum sentence of three years and/or a fine.

broad category. For example, there is reasonable consensus that ss.47-50, 52, 53 and 59A of the Sexual Offences Act 2003 are exploitation offences, given that they are referred to in this way in the *Sexual Offences Definitive Guideline*.⁴⁶ The Serious Crime Act 2015 amended all offences of “child prostitution” found in the Sexual Offences Act 2003, to offences of “sexual exploitation of a child”.

Exploitation offences may be drafted in various forms. Some illustrative examples are selected here. A clear example of a substantive exploitation offence requiring harm and culpability is found in s.1 of the Modern Slavery Act 2015. The s.1 offence penalizes a defendant who knowingly “holds another person in slavery and servitude”, or who knowingly “requires another person to perform forced or compulsory labour”, taking art.4 of the ECHR as its definition of these terms.⁴⁷ The offence attracts a maximum sentence of life imprisonment. Ss.47-50 of the Sexual Offences Act 2003 address sexual exploitation of persons under 18 years of age. For example, s.47 penalizes a defendant who intentionally obtains sex from an under-18 (not reasonably believing that they are 18 or over), or from an under-13.⁴⁸ The defendant must have made or promised payment to another person for these services, or known that another person has done so.⁴⁹

A substantive exploitation offence, which is a strict liability offence, is found in s.53A of the Sexual Offences Act 2003. S.53A penalizes a defendant who

⁴⁶ Sentencing Council, *Sexual Offences: Definitive Guideline* (2013) 2.

⁴⁷ s.1(2).

⁴⁸ s.47(1)(a),(c).

⁴⁹ s.47(1)(b).

pays for or promises to pay for sexual services from a prostitute, in circumstances where a prostitute has been exploited by a third party in a way “likely to induce or encourage” the provision of these sexual services. The defendant need not have been involved in or aware of exploitative conduct undertaken by a third party.⁵⁰

There are a number of substantive exploitation offences with an inchoate element, such that Costello’s argument that the criminal law penalizes only the outcome of forced labour is too blunt.⁵¹ S.2 of the Modern Slavery Act 2015 penalizes a defendant who “arranges or facilitates the travel of another person (‘V’) with a view to V being exploited”. The inchoate element is that the offence penalizes those who arrange or facilitate the travel of another, with a view to their exploitation. This requires intent to exploit during or after the travel, or knowledge that another person is likely to exploit V during or after the travel (s.2(4)).⁵² The s.2 offence attracts a maximum sentence of life imprisonment. S.4 of the 2015 Act contains an offence of committing any offence with the intention of committing an offence under s.2, carrying a maximum sentence of ten years’ imprisonment. In relation to sexual exploitation, s.52 of the Sexual Offences Act 2003 sets out an offence of intentionally causing or inciting another person to become a prostitute, “for or in the expectation of gain”. S.53 of the 2003 Act penalizes the intentional

⁵⁰ Another example can be found in s.55 of the 2003 Act (keeping or managing a brothel, which attracts a maximum sentence of 7 years).

⁵¹ C. Costello, “Migrants and Forced Labour: A Labour Law Response” in A. Bogg, C. Costello, A.C.L. Davies and J. Prassl (eds), *The Autonomy of Labour Law* (Oxford: Hart, 2015), p.191.

⁵² Exploitation includes the conduct set out in s.3 of the 2015 Act: slavery, servitude and forced or compulsory labour; sexual exploitation; removal of organs; securing services by force, threats or deception; securing services from children and vulnerable persons.

control of another person in relation to prostitution, with control undertaken “for or in the expectation of gain”.⁵³

Exploitation of persons and the limits of the criminal law

Despite high levels of interest in the topic, a principled criminal law response to exploitation of persons is far from settled. Given the current state of flux, the time is ripe to emphasize limitations of a criminal law response to exploitation. Rather than underplaying these limitations, they ought to be brought out into the open and addressed with principled arguments, if clarity in the criminal law is to be strengthened. This analysis is not intended to be exhaustive; rather, the aim is to identify current problems.

The first challenge may be illustrated by reference to the application of existing property offences to cover exploitation. It is commonly argued, post-*Hinks*, that fraud by abuse of position can in principle be used to penalize exploitation.⁵⁴ In their criminal law textbook, Andrew Simester and others identify fraud by abuse of position as a means of penalising “a number of forms of dishonesty that are worthy of the attention of the criminal law”, but which fall outside the scope of other dishonesty offences.⁵⁵ The writers appear to have dishonest exploitative conduct in mind in singling out those who dishonestly target the vulnerable.⁵⁶ Rebecca Williams has argued that fraud by abuse of position “was enacted to provide an alternative route for

⁵³ See House of Commons, Home Affairs Committee, *Prostitution* (15 June 2016).

⁵⁴ [2000] UKHL 53; [2001] 2 A.C. 241.

⁵⁵ A.P. Simester, J.R. Spencer, F. Stark, G.R. Sullivan and G.J. Virgo, *Simester and Sullivan's Criminal Law: Theory and Doctrine* 6th edn. (Oxford: Hart, 2016), p.639.

⁵⁶ above, p.625.

prosecuting [dishonest exploitation]”.⁵⁷ Lindsay Farmer has recently suggested that the aims of the criminal law’s property offences have now shifted. Rather than protecting property rights “as defined in the civil law”, the key concern is now to protect

“the interests of the vulnerable against conduct which poses a threat to the security of property and the securing of confidence in institutions such as the market in which property is transferred”.⁵⁸

On this view, the protection offered by certain property offences is to “an abstract class of victims (the vulnerable) and to an abstract conception of a system of property rights”.⁵⁹

The problem is what this reasoning conceals. There is a real danger here of burying the wrong of exploitation. Taking the property offences context as an example, the tendency here is to assume that a general fraud offence is fit for the purpose of penalizing exploitation of persons without first interrogating the contours of the exploitative wrong. Joel Feinberg’s work on exploitation in volume four of *The Moral Limits of the Criminal Law* is often referred to as if it is conclusive.⁶⁰ Feinberg argues that:

“there are three elements in all incidents of exploitation about which we

⁵⁷ R. Williams, “Cartels in the Criminal Law Landscape” in C. Beaton-Wells and A. Ezrachi (eds.), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Oxford: Hart, 2011), p.301.

⁵⁸ L. Farmer, *Making the Modern Criminal Law: Civil Order and Criminalization* (OUP, 2016), p.223.

⁵⁹ above, p.223.

⁶⁰ Feinberg, *The Moral Limits of the Criminal Law: Harmless Wrongdoing* (1988), pp.176-210.

can raise further questions: how A uses B; what it is about B that A uses; how the process redistributes gains and losses.”⁶¹

This is immediately followed up by the argument that:

“In addition, exploitation (in the pejorative sense with which we are here concerned) is assumed to be unfair (‘taking unfair advantage’) or otherwise subject to adverse criticism”.⁶²

In their insightful analysis of the *Hinks* decision, Alan Bogg and John Stanton-Ife explain that exploitation depends upon “the manner in which the victim is used, the characteristics that are utilized and the way in which exploitation allocates gains and losses”—a further restatement of Feinberg’s observations in *Harmless Wrongdoing*.⁶³ Bogg and Stanton-Ife do speculate about exploitation’s seriousness, arguing that there will be a stronger case of exploitation if strong predatory techniques are used, if moral virtues or vulnerabilities are utilized, and if there are “extensive gains at the expense of the victim’s losses”, but even these assertions are vague.⁶⁴ While Bogg and Stanton-Ife’s analysis of the case of *Hinks* reinvigorated debate about exploitation and property offences in the context of the English theft offence, it is now commonplace to assert exploitation’s relevance to the English fraud

⁶¹ above, p.179.

⁶² above, p.179.

⁶³ A. Bogg and J. Stanton-Ife, “Protecting the Vulnerable: Legality, Harm and Theft” (2003) 23 L.S., p.416.

⁶⁴ above, p.416.

offence.⁶⁵ But this shift has not been accompanied by enquiries into the wrong under discussion. This hardly makes sense: if Feinberg's, and Bogg and Stanton-Ife's conceptual approaches to exploitation require actual gain and loss, why is the English offence of fraud a compelling candidate for censuring exploitation? The general fraud offence found in s.1 of the Fraud Act 2006 does not require actual gain or loss. Does this mean that the fraud offence does not penalise the gist of the wrong of exploitation? Moreover, is it apparent that existing property offences, such as the general fraud offence, protect the "vulnerable" (a category of persons whose members are far from clear) from exploitation, as Farmer suggests? Taking Feinberg's work on exploitation as authoritative is hardly perspicuous in this context. Even a cursory look at the English fraud offence leads one to wonder whether it can be used to address interpersonal exploitation clearly and transparently.

In principle, and before considering how an offence will be judicially interpreted, it ought to be asked whether i. it is justifiable that an existing offence be used to censure exploitation; and ii. if so, whether it is fit for purpose to fulfill that function. The argument is not limited to discussion of exploitation in the property offences context, but the limitations of the current approach are clearly demonstrated in this context. Exploitation is an opaque concept. Its meaning is especially unclear where it is used across a variety of contexts where attempts are not made to highlight if it has any special features in a particular context. It makes little sense that commentators begin with a general and undeveloped idea of interpersonal exploitation in the

⁶⁵ [2000] UKHL 53; [2001] 2 A.C. 241. For example, D. Ormerod and K. Laird, *Smith and Hogan's Criminal Law* 15th edn. (Oxford: OUP, 2015), p.896-97.

property offences sphere, arguing that the existing property offences adequately penalise this wrong.

Moreover, when the contours of the wrong are not identified, it provides opportunity for judicial narrowness in using existing broad offences to penalize exploitation. The Court of Appeal's decision in *R v Valujevs* is a recent example of this.⁶⁶ A key issue considered by the court was whether the trial judge had been right to reject a case to answer in relation to fraud by abuse of position. The defendants worked as unlicensed gangmasters in Cambridgeshire, providing agricultural work, transport and accommodation to workers who had come to the UK from Latvia and Lithuania. The defendants sought to ensure that their workers were highly dependent upon them by creating a situation of "debt bondage". Was the position of unlicensed gangmaster one in which an individual "is expected to safeguard, or not to act against, the financial interests" of his workers, as required by section 4(1)(a) of the Fraud Act 2006? Despite the migrant workers' highly precarious work status and conditions of high dependency upon their employer, Fulford L.J. narrowly based his reasoning on why there was a case to answer in relation to fraud by abuse of position on control of monies and applicable Gangmasters Licensing Standards.⁶⁷ Even if the general fraud offence is in principle a tool which can be used to penalize exploitation of persons, this reasoning was not borne out in the Court's judgment. While *Valujevs* was not the most extreme case of labour exploitation, it demonstrates the potential for inconsistency about how exploitation arguments will be interpreted judicially.

⁶⁶ [2014] EWCA Crim. 288; [2015] 3 W.L.R. 109.

⁶⁷ See J. Collins, "Fraud by Abuse of Position and Unlicensed Gangmasters" (2016) 79 M.L.R. p.354.

Where it is important to present the criminal law's response as one of penalizing exploitation, a more targeted criminal law response may need to be considered.⁶⁸

The second challenge, touched upon already, is imprecision. The meaning of "exploitation of persons" is inherently imprecise. Feinberg's theoretical account, relied upon by criminal lawyers, makes this clear.⁶⁹ The three elements identified as key to exploitation of persons—how A uses B; what it is about B that A uses; and how the process redistributes gains and losses—may be building blocks of what it is to exploit another person.⁷⁰ But Feinberg makes it clear that each of these three elements of exploitation raise further questions, and argues that a full account of exploitation as unfair advantage-taking would require "a complete normative theory".⁷¹ Rather than seeking to offer such a theory, Feinberg instead raises a number of questions which will inform decisions about exploitation's unfairness.

This account opens the way for debate in at least two directions. On the one hand, it is possible to focus on identifying what Feinberg has left out of his own account. While the focus is on three elements core to interpersonal exploitation, the issue of a complete normative account of interpersonal exploitation is bypassed. In this sense, the account of exploitation offered by Feinberg is "light" and must be supplemented with explanation as to what is unfair about interpersonal exploitation. By contrast, we could read Feinberg's

⁶⁸ See G. Williams, "Convictions and Fair Labelling" (1983) 42 C.L.J. p.85.

⁶⁹ Feinberg, *The Moral Limits of the Criminal Law: Harmless Wrongdoing* (1988), pp.176-210.

⁷⁰ above, p.179.

⁷¹ above, p.201.

account of interpersonal exploitation as itself a description of exploitation's unfairness (thus producing the "heavy" sense of the term).⁷² Feinberg argues that

"insofar as certain elements are present in a relationship between A and B, that relationship tends to be unfairly exploitative, and, insofar as they are absent, that relationship tends not to be unfairly exploitative".⁷³

Yet even on this reading, the case for selecting these elements must be scrutinized. Is it defensible that exploitation will only tend to be unfair, as Feinberg argues in *Harmless Wrongdoing*, if it leads to gain for an exploiter?⁷⁴ Even if a "heavy" reading of Feinberg's account is adopted, these building blocks of exploitation should not be treated as authoritative. A willingness to scrutinize these elements seems to be what Feinberg intended, given that he argues that:

"A fuller account of the characteristics that distinguish exploitation from mere profitable utilization would follow the outline of exploitation's main structural elements....and their main combinations and variations."⁷⁵

On either a "light" or "heavy" reading there is still plenty of important work to do. Criminal lawyers ought to acknowledge this imprecision in Feinberg's account rather than being tempted to ignore it.

⁷² I would like to thank Simon Gardner for emphasising this point to me.

⁷³ above, p.201.

⁷⁴ above, p.179.

⁷⁵ above, p.201.

Theory aside, in practice, where exploitation-based reasoning is employed, criminal lawyers must make clear what meaning they are attributing to the term. It seems most accurate to accept that the meaning of “exploitation of persons” will vary according to context. This reasoning is supported by the Court of Appeal’s judgment in *R v SK*:

“In the modern world exploitation can and does take place, in many different forms. Perhaps the most obvious is that in which one human being is treated by another as an object under his or her control for a sexual purpose. But ‘slavery or servitude’ and ‘forced labour’ are not confined to exploitation of that sort. One person may exploit another in many different ways. Sexual exploitation is one, domestic servitude, [...] another.”⁷⁶

There will be common elements or building blocks on which all types of exploitation are based. And so, in principle, it is possible to generate a general account of what it means to exploit another person spanning sexual exploitation, labour exploitation and financial exploitation.⁷⁷ Other wrongs may also come under a broad umbrella term of “interpersonal exploitation”. For example, we noted above that human trafficking is not synonymous with exploitation, but is enough part of the “problem” of interpersonal exploitation to

⁷⁶ [2011] EWCA Crim. 1691; [2012] 3 W.L.R. 933 at 949.

⁷⁷ Such that Feinberg’s work on interpersonal exploitation is a useful starting point.

justify considering it a sub-category.⁷⁸ This may be because it is difficult to identify the point in time at which human trafficking “crosses over” into exploitation.

However, conceptual clarity is improved if different types of interpersonal exploitation are identified, and if wrongfulness is explicated in relation to a specific type of interpersonal exploitation. This could be done on the basis of the interests attacked—sexual, bodily, labour or financial, for example.⁷⁹ This shifts the focus onto addressing some key questions. Does exploitation have special features in this context? Are some types of interpersonal exploitation linked with targeting certain groups of persons, such as the vulnerable? Does wrongfulness hinge on the fact that a type of exploitation causes certain results to occur? Or will a particular form of exploitative conduct suffice? Are the means used (for example, coercion) independently wrongful? The next step for criminal lawyers is to develop our understanding of these exploitative wrongs and to map their intersections.⁸⁰ The impact on criminalization arguments is clear. Since there are different ways in which a person can wrongfully exploit another person, the state’s duty to prevent or penalise exploitation must be reviewed in the light of a specific type of exploitation. The state may have a duty to prevent labour exploitation using the criminal law but not financial exploitation, for example. The specific type of exploitation in focus must be made clear before criminalization questions can be raised and debated.

⁷⁸ For example, a right that no one shall be subjected to human trafficking has been read into art.4 ECHR, which prohibits serious labour exploitation, see *Rantsev v Cyprus and Russia* (2010) 51 E.H.R.R. 1 at [282].

⁷⁹ Notwithstanding that these wrongs may overlap in practice.

⁸⁰ This larger task cannot be pursued in this article.

A third challenge for criminal law theorists follows on: how should the meaning of “exploitation of persons” be explicated? We need to know what type of account criminal lawyers aspire to provide. One approach is to identify clear central cases of different types of exploitation—be it clear central cases of financial, sexual, labour or bodily exploitation.⁸¹ Once a cluster of central cases are isolated, the concern is then to isolate key elements of these types of wrongful exploitation. For example, targeting a vulnerable person could be a key element of core cases of financial exploitation, but not of sexual exploitation. Inevitably there will be borderline cases which have some features of the clear case but not others, or others which have all of the features but only to a lesser degree. An alternative approach is to seek to provide a strong normative, analytical account of a specific exploitative wrong. This could be done in relation to the interests attacked—for example, by offering a normative account of what it means to sexually exploit another person. If we are to utilize the Kantian “mere means” principle, a normative, analytical account may be put forward to explain what it actually is to use another person as a “mere means”.⁸² Inevitably there will also be weaker and/or borderline cases which fall outside the scope of a strong normative account.

The strength of each approach should be debated [and defended] by criminal lawyers. For example, it may be argued that if specific core cases of

⁸¹ A. Wertheimer, *Exploitation* (Harvard: HUP, 1999), pp.33-34, writes about making “exploitation claims” in certain contexts, such as that of unconscionable contract, exploitation of student athletes, commercial surrogacy, unconstitutional conditions, sexual exploitation in psychotherapy.

⁸² I. Kant, *Foundations of the Metaphysics of Morals* (1959) p.47.

exploitation are first identified in the “real world”, there will be a better “fit” between an account of the exploitative wrong and our intuitions about what is “exploitative”. Others may doubt the likelihood that these clear examples (and perhaps clear intuitions) can be agreed upon. Regardless of the approach, criminal lawyers must be clear about the type of account they are seeking to provide and why.

A fourth source of complexity relates to an unclear relationship between criminalization and the response of other branches of the common law to exploitation of persons. How does criminalization relate to immigration controls, labour market regulation, banking legislation to protect the vulnerable, and corporate obligations regarding supply chains, for example? The proper starting point is to emphasise the limitations of the criminal law in responding to the serious exploitation of persons. We began this short article with Costello’s argument that there is an unhelpful focus on finding criminal law solutions for labour exploitation.⁸³ There is a concern here that coercive measures can do little to address the reason for labour exploitation—vulnerability which arises because of migrant workers’ precarious work status’. The appropriate course of action in such cases may be regulatory measures in the labour market to address this vulnerability. Costello argues that the “normative core of labour law, seeking to avoid domination in work relations, demands that all workers in the territory enjoy labour rights”.⁸⁴ While civil and/or regulatory measures do not preclude a criminal law

⁸³ C. Costello, “Migrants and Forced Labour: A Labour Law Response” in A. Bogg, C. Costello, A.C.L. Davies and J. Prassl (eds), *The Autonomy of Labour Law* (Oxford: Hart, 2015), p.189.

⁸⁴ above, p.227.

response to exploitation, it is necessary to justify why criminal law measures should also be implemented.

It is also important to grapple with the consistency of the common law approach to exploitation, across several branches of the common law. Concerns arise where criminal law measures to penalize exploitation are enacted while systemic common law deficiencies remain unaddressed. For instance, Virginia Mantouvalou has argued that the Modern Slavery Act 2015 will not produce a coherent regime to target labour exploitation, so long as it stands in conflict with a tied visa system for overseas domestic workers.⁸⁵ Immigration Rules 159A-159H tie a migrant domestic worker's visa to the employer to whom they entered the UK for a maximum stay of six months, even if that working relationship is exploitative.⁸⁶ Criticism can be made of measures put in place to protect migrant domestic workers who enter the UK using this visa.⁸⁷ For example, the level of protection offered by the requirement of a contract of employment, agreed in advance before a worker enters the UK to work, can be doubted.⁸⁸ One concern is that the most vulnerable workers will not have the bargaining power necessary to ensure fair terms in advance of their employment.⁸⁹ Much more could be said about the inadequacy of these safeguards. The key point for the purposes of this article is that here is another source of complexity; there is a need for a

⁸⁵ V. Mantouvalou, "'Am I Free Now?' Overseas Domestic Workers in Slavery" (2015) 42(3) *Journal of Law and Society* p.329.

⁸⁶ <<http://www.ukbaa.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part5>>.

⁸⁷ V. Mantouvalou, "'Am I Free Now?' Overseas Domestic Workers in Slavery" (2015) 42(3) *Journal of Law and Society* pp.336-37.

⁸⁸ Home Office, "Statement of Intent: Changes to Tier 1, Tier 2 and Tier 5 of the Points Based System; Overseas Domestic Workers; and Visitors" (February 2012).

⁸⁹ See A. Bogg, "Sham Self-Employment in the Supreme Court" (2012) 41 *I.L.J.* p.328.

coherent and interdependent legal response to serious exploitation of persons. Certainly it is necessary that the intersections between the criminal law and labour law in responding to interpersonal exploitation in the labour market are mapped.

A final challenge in utilizing the criminal law to penalize exploitation is exploitation's complex relationship with consent. How, if at all, is valid consent, or lack of consent, relevant to exploitation of persons? Is there a strong case for marking out lack of consent in a core account of an exploitative wrong? Existing legal approaches vary. Art.3(a) of the Palermo Protocol defines human trafficking for exploitation without making reference to lack of consent. Art.3(b) goes on to state that any consent present is irrelevant where a person has been trafficked. If an account of financial exploitation is linked to property offences in England and Wales, it may also be important to note that many major property offences in England and Wales do not require lack of consent.⁹⁰ By contrast, some concepts key to serious labour exploitation do require lack of consent. Forced labour is necessarily accompanied by lack of consent since it is work "exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily".⁹¹ There are stronger reasons to think that lack of consent is important when defining sexual exploitation of young adults aged 16 and 17. Anne Marie Carrie, Barnardo's Chief Executive, has argued that

⁹⁰ For example, s.1, Theft Act 1968; s.1, Fraud Act 2006.

⁹¹ I.L.O. Convention No. 29. This was used as a "starting point" for interpretation of forced labour in Article 4 E.C.H.R. in *Van der Mussele v Belgium* (App no. 8919/80, Judgment of 23 November 1983) [32]; and *Siliadin* (2006) 43 EHRR 287 [117].

“In recent years there has been great progress in addressing [sexual exploitation] at a national and local level, but everyone coming into contact with vulnerable teenagers needs to remember that they are children too, and cannot consent to their own abuse”.⁹²

The complexity of doctrinal and policy arguments must be teased out by criminal lawyers. The first crucial issue is to clarify what amounts to valid legal consent. A detailed analysis is beyond the boundaries of this preliminary article, but Westen’s, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct*, identifies both “factual” and “legal” accounts of valid consent, and is a useful starting point.⁹³ “Factual” consent arises when an individual has acquiesced in a course of conduct (factual attitudinal consent), which they may have gone on to express (factual expressive consent).⁹⁴ A “thicker” legal account of consent also needs to be considered. This involves assessing whether key ideas are present for a legal system to hold consent legally valid (prescriptive consent). Policy arguments will inform the selection of necessary conditions for prescriptive consent. Westen argues that in the sexual offences context ideas of voluntariness, knowledge and competence are key to this assessment.⁹⁵ Westen argues that legal consent will be found if a relevant set of factors for valid consent are satisfied, or because a legal system imputes valid legal consent. Unlike prescriptive consent, imputed consent is entirely fictitious.

⁹² “Grooming Victims ‘Still Being Failed’”, Say M.P.s (10 June 2013) <<http://www.bbc.co.uk/news/uk-politics-22836634>>.

⁹³ P. Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct* (Ashgate 2004).

⁹⁴ above, p.9.

⁹⁵ above, p.180.

For this reason, imputed consent is loaded from the outset with policy ideas, since it functions “solely to constitute legal judgements about people’s relationships to one another”.⁹⁶

A further complication concerns the relevance of policy arguments in determining valid legal consent. It is tempting to automatically prioritize policy arguments in the criminal law on the grounds that recognizing valid legal consent is too risky for vulnerable victims. An illustration can be found in analysis of sexual exploitation of 16 and 17 year-olds, who can in England and Wales give valid consent to sex. Recent research has highlighted that a “boyfriend” model of sexual exploitation incorporates a broad range of conduct, which begins with a young person believing “that they have a genuine friendship or loving relationship with their abuser”.⁹⁷ Victims may then be asked “to perform sexual acts with their [boyfriend’s] friends as a favour”.⁹⁸ As the relationship progresses, victims may be

“required to attend parties and [to] sleep with multiple men and threatened with violence if they try to seek help. They may also be required to introduce their friends as new victims”.⁹⁹

⁹⁶ above, p.5.

⁹⁷ Report by the Director for Children Services, *Action in Response to Child Sexual Exploitation in Oxfordshire* (26 November 2013), p.35.

⁹⁸ Home Affairs Select Committee, “Child Sexual Exploitation and the Response to Localised Grooming: Follow-Up” (15 October 2014), p.68.

⁹⁹ Report by the Director for Children Services, *Action in Response to Child Sexual Exploitation in Oxfordshire* (26 November 2013), p.35.

While it is conceivable that valid legal consent is given to sex on a first occasion, if applied, coercion undermines a decision-maker's ability to make a free voluntary decision.

In these circumstances, there is a strong policy argument to automatically discount any apparent initial consent given by a 16 or 17 year-old in certain cases involving a vulnerable young person. Of course it is particularly difficult to set appropriate "thresholds for intervention with adolescents".¹⁰⁰ Installing 18 as the age for exploitation offences (like the "position of trust" offences in the Sexual Offences Act 2003) ensures that vulnerable young persons do not fall through the net in investigating incidents of sexual exploitation on the grounds that they have, at some point, apparently consented to sex.

To support these reasons, any non-coercive conduct involved in these types of scenarios could be explained as grooming, with grooming viewed as simply part of the process of sexual exploitation. On this view, it does not matter if exploitative conduct begins "innocently" with a victim having sex with their older boyfriend with no apparent coercion. What matters is that the process ends with a victim having coerced sex with many others. Coercion applied at a later stage "taints" any previous consent given.

However, we should be cautious about prioritizing policy arguments. Is automatically discounting potentially valid consent at an early stage in a sexual relationship, in case it leads to exploitation, too high a conceptual price

¹⁰⁰ I. Brodie and J. Pearce, "Exploring the Scale and Nature of Child Sexual Exploitation in Scotland" (Scottish Government Social Research 2012) 34.

to pay for protecting (potentially vulnerable) young adults between 16 and 18? What if an exploiter's aim to attack sexual interests do not come to fruition? We can envisage policy arguments being used in determining the relationship between consent and other forms of exploitation of persons, too. For example, it may be tempting to presume that victims of elder financial exploitation lack capacity to consent, given close links between exploiters and the targeting of vulnerable persons.¹⁰¹ However, recent research suggests that exploitees may be active participants in financial exploitation, and may have capacity sufficient to give valid consent. Shelly Jackson and Thomas Hafemeister have found that elderly victims of pure financial exploitation "tended to be physically and financially independent".¹⁰² Their report notes that elderly victims of financial exploitation, when compared with the average elderly person,

"tended to have fewer communication problems, less cognitive confusion/dementia, less dependence on others, likely to be younger in age, and to not be experiencing poor social support".

¹⁰¹ See P. Sadler, S. Kurrle, and I. Cameron, "Dementia and Elder Abuse" (1995) 14(1) *Australasian Journal on Ageing* pp.36, 38, who identify a link between cognitive impairment (particularly dementia) and elder financial exploitation. This research involved a small sample, reviewing cases of elder abuse in a one-year period for a small number of local service providers for elderly people. Recent research suggests that young persons who have tumultuous lives, who have gone missing, or who have been taken into care, are at greater risk of sexual exploitation, see Barnardo's, *The Tangled Web: How Child Sexual Exploitation is Becoming More Complex* (2012), p.6; Home Affairs Select Committee, "Child Sexual Exploitation and the Response to Localised Grooming: Follow-Up" (15 October 2014), p.5.

¹⁰² S. Jackson and T. Hafemeister, *Financial Abuse of Elderly People vs Other Forms of Elder Abuse: Assessing their Dynamics, Risk Factors, and Society's Response* (Final Report to the National Institute of Justice 2010), p.9.

Indeed, the report makes clear that lack of capacity is not even a dominant characteristic of these cases.¹⁰³ The important point to stress in this piece is that exploitation's relationship to consent may vary depending on the type of interpersonal exploitation in question (be it financial, sexual, bodily, labour exploitation), and that there may be no sound reason to underplay the complexity of the relationship between consent and exploitation in doctrinal terms.

Conclusion

Arguments for criminalisation ought not to be used as trump cards in the state's response to exploitation of persons. Two lines of argument have been developed in this article. The first is that exploitation's especially complex relationship with principles for criminalisation must be exposed, and this work was undertaken in part 1. But equally important is that the state's exercise of coercive power be grounded in normative political theory. I have not suggested that republican political theory provides a means of justifying a particular criminalization decision in relation to exploitation. Nevertheless, legal reasoning about exploitation and the criminal law cannot be detached from consideration of the basis of state power, and how that power should be exercised. Should republican political theory prove to be a useful framework, as I have argued, then further scrutiny of situations where a citizen will hold capacity for arbitrary or uncontrolled domination in cases of exploitation should be considered.

¹⁰³ above, p.288.

The second line of argument further develops the point that criminalisation is, and should continue to be seen as, limited in addressing the root of power dynamics which may lead to exploitation. If criminal law measures are to be justified, criminal lawyers cannot ignore five current difficulties indicated in part 4 of this article. At face value the most uncontroversial among them is the first—criminal lawyers must resist assuming that existing criminal offences cover exploitative conduct, either intrinsically or through judicial interpretation, without supporting argument. On the contrary, the point requires particular emphasis in relation to exploitation, given that careful supporting argument has not been given in the property offences sphere. If exploitation arguments are to be meaningfully deployed in the criminal law sphere, prioritizing clarity and transparency, then attention must be directed toward explicating various forms of wrongful interpersonal exploitation. This also involves prizing apart the priority of doctrinal and policy arguments in relation to valid legal consent. Of current significance is the unexplored interface between criminalization and the response of other branches of the common law to exploitation of persons. There is potential for tension between them where, for example, the criminal law acts in a protectionist mode in relation to severe labour exploitation whilst immigration rules and employment law practices remain unregulated. Can connections between these branches be illuminated? But nor should the limits of the criminal law in protecting vulnerable persons be underplayed, as this article has argued. There is a great deal of important work still to be done.

